92-457

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

SEA AIRMOTIVE, INC.;
GAY AIRWAYS, INC.;
A.E. GAY, INC.;
A.E. GAY,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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September 11, 1992

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## QUESTIONS PRESENTED

In a suit under the Federal Tort Claims Act, §§ 1346(b), 2671 et seq., is the Federal government entitled to assert a defense under state law if the same subject matter is preempted by a federal law which does not recognize that defense?

## LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were Bell Helicopter Textron, Inc., Sea Airmotive, Gay Airways, Inc., A.E. Gay, Inc., and A.E. Gay as plaintiffs-appellants and the United States of America as defendant-appellee.

The parent company of Bell Helicopter Textron, Inc. is Textron, Inc. Bell Helicopter Textron, Inc. has no subsidiary companies. Sea Airmotive, Inc., Gay Airways, Inc., and A.E. Gay Inc. have no parent or subsidiary companies.

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No. _____

# IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1991

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SEA AIRMOTIVE, INC.;
GAY AIRWAYS, INC.;
A.E. GAY, INC.;
A.E. GAY, *Petitioners,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BRIEF FOR PETITIONERS SEA AIRMOTIVE, INC.;
GAY AIRWAYS, INC.; A.E. GAY, INC.; A.E. GAY

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The petitioners, Sea Airmotive, Inc., Gay Airways, Inc., A.E. Gay, Inc., and A.E. Gay, respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled

proceeding on December 9, 1987 and June 15, 1992.

## OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Circuit are reported at 967 F.2d 307 (9th Cir. 1992) and 833 F.2d 1375 (9th Cir. 1987).

The opinion of the United States District Court for the District of Alaska is reported at 755 F.Supp. 269 (D. Alaska 1990).

## JURISDICTION

Petitioners brought this suit in the United States District Court for the District of Alaska against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. for contribution and indemnity arising from the crash of a Bell helicopter in British Columbia, Canada, on June 13, 1979. The district court granted the government's motion to dismiss and

entered judgment dismissing all of petitioners' claims. Petitioners appealed.

The Ninth Circuit affirmed the district court with respect to petitioners' contribution claims, but reversed and remanded with respect to their indemnity claims. Bell Helicopter v. United States, 833 F.2d 1375 (9th Cir. 1987) (hereinafter "Bell I"). On remand the district court granted the government's motion for summary judgment and dismissed petitioners' indemnity claims. 755 F.Supp. 269 (D. Alaska 1990) (hereinafter "Bell II"). Petitioners appealed the district court decision, which was affirmed by the Ninth Circuit. 967 F.2d 307 (9th Cir. 1992) (hereinafter "Bell III").

Jurisdiction of this Court to review the final judgment of the Ninth Circuit is proper pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., waives sovereign immunity to permit suits for negligence against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

## STATEMENT OF THE CASE

This action arose from the crash of a Bell helicopter in British Columbia, Canada, on June 13, 1979. The facts are accurately summarized in Bell I, 833 F.2d at 1376-77, and Bell II, 755 F.Supp. at 271.

The helicopter crashed when it ran out of fuel due to improper pre-flight planning by the pilot, Lt. William

Harrigan, an officer of the National Oceanographic and Atmospheric Administration (hereinafter "NOAA"). Bell I, 833 F.2d at 1376. Mr. Harrigan's passenger, Gary Mitchell, a civilian employee of NOAA, was seriously injured. Id. Mr. Mitchell exercised his exclusive remedy against the government and received compensation under the Federal Employers Compensation Act, 5 U.S.C. §§ 8101 et seq., (hereinafter "FECA"). Bell I, 833 F.2d at 1377.

Mitchell then sued the helicopter manufacturer (Bell), the seller, Sea Airmotive, and the owner/lessor, Gay Airways, Inc., A.E. Gay, Inc. and A.E. Gay (Gay Airways, Inc., A.E. Gay, Inc., A.E. Gay, and Sea Airmotive, hereinafter "petitioners"), alleging the helicopter was defective because it was not equipped with shoulder harnesses and was

therefore uncrashworthy. Bell II, 755 F.Supp. at 271. Petitioner, Gay Airways Inc., offered to install shoulder harnesses before the helicopter left Anchorage but Harrigan declined. Id. Bell and petitioners settled with Mitchell in the amount of $2,400,000, and then brought suit for contribution and indemnity against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (hereinafter "FTCA"), for the negligence of the government pilot, Mr. Harrigan. Id. Before filing of this suit, this Court in Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), held that the FECA did not bar claims for indemnity under the FTCA. After filing suit, the United States moved to dismiss petitioners' claims, arguing that it was immune from suit for contribution or

indemnity by reason of the exclusivity provisions of the Alaska Workers' Compensation Act, Alaska Stat. § 23.30.055 (hereinafter "AWCA"). Bell II, 755 F.Supp. at 271. The AWCA precludes claims for contribution and indemnity against an employer subject to the state act. Id. at 271-72. The government argued it was entitled, by analogy, to like immunity under the FTCA even though it was not an employer subject to the AWCA. Id. at 271. The district court granted the government's motion, and the petitioners appealed. Bell I, 833 F.2d at 1306.

Notwithstanding this Court's ruling in Lockheed, the Ninth Circuit affirmed the district court's ruling in this case on the basis that the government was entitled to employer immunities under the AWCA. Bell I, 833 F.2d at 1377-1379. However, the court remanded the

case to examine the petitioners' implied indemnity claim under Alaska law. Id. at 1379. Specifically, the Ninth Circuit remanded to determine whether the requirements for common-law indemnity were satisfied, as articulated in Indus. Risk Insurers v. Creole Prod. Serv., 568 F.Supp. 1323, 1328 (D. Alaska 1983), aff'd, 746 F.2d 526 (9th Cir. 1984). Id.

On remand, the government renewed its motion to dismiss and for summary judgment. Bell II, 755 F.Supp. at 272. The district court granted the government's motion for summary judgment on the basis that petitioners' claim for indemnity could not be met because the government was immune from liability under the AWCA exclusivity provisions. Id. at 274. Petitioners appealed and the Ninth Circuit affirmed on the basis that the AWCA barred petitioners' claims

for implied contractual indemnity. Bell III, 967 F.2d at 308-309.

**REASONS FOR GRANTING THE WRIT**

Review in this case is necessary to settle important questions involving the proper choice-of-law and federal preemption analysis under the FTCA as originally enunciated by this Court in Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

The present case conflicts with this Court's decision in Richards and decisions from the Second, Fifth and Sixth Circuits involving similar choice-of-law and federal preemption issues. Granting review in this case will give this Court the opportunity to clarify the proper choice-of-law and federal preemption analysis in suits brought under the FTCA.

I.

**THE PRESENT CASE CONFLICTS WITH THE RULE ENUNCIATED BY THIS COURT IN RICHARDS V. UNITED STATES.**

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., waives sovereign immunity to permit suits for negligence against the United States, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). This Court in Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), interpreted this provision to require that the government's liability be determined in accordance with the "whole law" of the state where the negligent act or omission occurred, including that state's choice-of-law rules. Id., 369 U.S. at 11.

This seemingly straightforward rule has been subject to conflicting interpretations by the circuits where governing federal substantive law preempts state law or where the state law does not apply to the United States.

In the present case, Alaska law recognizes a substantive right to contribution and indemnity. Vertecs Corp. v. Teichold Chemicals, Inc., 661 P.2d 699 (Alaska 1983); Indus. Risk Insurers v. Creole Prod. Serv., 568 F.Supp. 1323, 1328 (D. Alaska 1983), aff'd, 746 F.2d 526 (9th Cir. 1984). Alaska law also recognizes an employer's immunity against contribution and indemnity claims, where the employer has paid benefits to an injured employee under the Alaska Worker's Compensation Act. Alaska Stat. § 23.30.055, Lake v. Constr. Mach., Inc., 787 P.2d 1027, 1031 (Alaska 1990).

In this case, the Ninth Circuit reasoned that the FTCA required the government's liability to be determined in accordance with state substantive law, and that the government's right to immunity from suit should therefore be determined by reference to the analogous provisions of the AWCA rather than the FECA system under which the injured federal employee, Mr. Mitchell, actually received compensation. Bell I, 833 F.2d at 1377-1379. Finding the AWCA's exclusivity provisions immunized covered employers from claims of contribution or indemnity, the Ninth Circuit held that the federal government was entitled to like immunity under the FTCA. Bell I, 833 F.2d at 1377-1379; Bell III, 967 F.2d at 308-309.

The Ninth Circuit's wooden application of purely "internal" Alaska substantive law, conflicts with this

Court's ruling in Richards and Lockheed. The analysis used by the Ninth Circuit also conflicts with other circuits applying federal substantive law under the Richards "whole law" of the state analysis.

## II.
## RICHARDS REQUIRES APPLICATION OF THE STATE'S "WHOLE LAW."

In Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), plaintiffs brought suit against the United States under the FTCA for wrongful death arising from the crash of an airplane in Missouri while en route from Oklahoma to New York. Id. at 3. The issue before this Court was what law should a federal court apply in a multistate tort action brought under the FTCA. Id. at 2.

This Court initially noted that in five circuits in which the issue had

been addressed, resolution of what law applied was reached by one of three conflicting alternatives including: "(1) the internal law of the place where the negligence occurred, or (2) the whole law (including choice-of-law rules) of the place where the negligence occurred, or (3) the internal law of the place where the operative effect of the negligence took place." Id. at 3. This Court granted certiorari to "resolve the threefold conflict and to enunciate a rule that can be applied uniformly in Tort Claims Act cases...." Id. at 5.

After reviewing the FTCA's legislative history and other policy considerations this Court concluded that a federal court in an FTCA action should apply the "whole law" of the state, including state choice-of-law rules, where the negligent act or omission occurred. Id. at 11. In reaching this

conclusion this Court reasoned that applying the "whole law," rather than the purely "internal law" of the state was more consistent with treating the United States as a private person as mandated by the FTCA. Id. at 11-12.

## III.

**THE CIRCUITS ARE IN CONFLICT IN APPLYING RICHARDS TO SITUATIONS INVOLVING FEDERAL PREEMPTION OF STATE LAW OR STATE LAW WHICH DOES NOT APPLY TO THE FEDERAL GOVERNMENT.**

Since Richards, the circuits have generally applied the "whole law" rule in FTCA cases to determine which state substantive law applies in situations involving multistate parties or conduct. See, e.g., Bodrug v. United States, 832 F.2d 136 (10th Cir. 1987) (applying Utah's conflict of law rules to determine whether Utah or Montana substantive law should control); Bonn v.

Puerto Rico Int'l Airlines, Inc., 518 F.2d 89 (1st Cir. 1975) (applying conflicts principles of Puerto Rico to determine whether the law of Puerto Rico or the Virgin Islands applied); Gelley v. Astra Pharmaceutical Prod. Inc., 610 F.2d 558 (8th Cir 1979) (applying Minnesota law under District of Columbia choice-of-law analysis); Ducey v. United States, 713 F.2d 504 (9th Cir. 1983) (applying Nevada choice-of-law rules to determine whether California or Nevada law applied). Typically, as in Richards, these cases have dealt with conflicts in substantive law arising from multistate torts.

A more difficult question however, is how to treat a conflict between substantive state and federal law in an FTCA case. In this area the circuits have diverged. Although Richards recognized that the FTCA limits some

rules otherwise available to claimants under state law,[1] the circuit courts are in hopeless conflict on when and how federal law should apply in FTCA cases. Thus, the issue is simple but important: if the United States is to be treated as a private person under the "whole law" of the state, does the "whole law" include applicable federal law where a state court would look to federal law to supply the appropriate rule of decision.

For example, in Caban v. United States, 728 F.2d 68 (2d Cir. 1984), plaintiff, an non-english speaking U.S. citizen sued the Immigration and

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[1]While adopting the "whole law" rule, this Court also recognized there were other instances set forth in the Act where the "liability of the United States [was] not co-extensive with that of a private person under state law." Richards, 369 U.S. at 13-14. The Court noted that the FTCA itself limits claimants' rights in various areas including: forum selection, limitations period, right to jury trial, pre-judgment interest, punitive damages, specific torts, claims arising in a foreign country, and various other activities. Id. at 13 n. 28.

Naturalization Service under the FTCA for wrongful detention at a New York airport while attempting to reenter the United States. Applying the Richards "whole law" requirement, the Second Circuit concluded the court should apply whatever law, including federal law, the state court would apply in like circumstances involving a private defendant. 728 F.2d. at 72. Examining New York's law of false imprisonment, the court concluded that a New York court could look to "some other pertinent body of law" for a legal justification for imprisonment. Id. at 72-73. Accordingly, the court adopted a federal standard of care for the justification of imprisonment given the government's exclusive interest in protecting national borders. Id.

A different approach was used by the Sixth Circuit in the case of Gowdy

ıted States, 412 F.2d 525 (6th Cir. 9), cert. denied, 396 U.S. 960, 90 .Ct. 437, 24 L.Ed.2d 425 (1969). In Gowdy, the Sixth Circuit first looked to federal law rather than state law to determine whether an FTCA claim would be governed by maritime or state law. Id. at 527. Here, the court concluded that federal maritime law did not apply and then went on to apply the substantive law of Michigan. Id. at 527-529.

Contrary to the Ninth Circuit's decision in the present case, the Sixth Circuit refused to apply a state statute, which by its terms was inapplicable to the federal government. In Megge v. United States, 344 F.2d 31 (6th Cir. 1965), cert. denied, 382 U.S. 831, 86 S.Ct. 69, 15 L.Ed.2d 74 (1965), plaintiff brought an action under the FTCA against a non-commissioned officers' club for serving liquor to an

intoxicated serviceman who subsequently injured plaintiff off-base. Id. at 31-32. At issue was whether a state dramshop act applied to a non-commissioned officers' club located on federal property. Id. at 32. Plaintiff argued that because the government served liquor in the state, state law should apply. Id. The Sixth Circuit concluded it did not, as the club was not required to obtain a state liquor license and therefore did not meet the definition of "vendor" under the state act. Id. at 33-34.

In Johnson v. United States, 576 F.2d 606 (5th Cir. 1978), the Fifth Circuit decided that federal rather than state rules of collateral estoppel should apply to an FTCA action. The court noted that because of the importance of state law under the FTCA, several courts had found that state

rules of collateral estoppel applied. Id. at 610 (citations omitted). Interpreting Richards, the Fifth Circuit determined that it must look to the FTCA and other federal statutory provisions relating to damage actions against the United States. Id. at 611. Reasoning that the Richards "whole law" requirement concerned only conflicts of law principles affecting substantive liability, rather than issues of procedure or the relationships between courts, the court concluded it should apply federal principles of res judicata and collateral estoppel rather than state law. Id. at 612-613. See also, Bowen v. United States, 570 F.2d 1311 (5th Cir. 1978) (under Richards' analysis, court rejecting application of federal common-law on issue of whether rule of comparative negligence applied).

Each of the above cases represents an issue of federal preemption or application of state law to the federal government in an FTCA action. In contrast to the above cases, the Ninth Circuit in the present case and in LaBarge v. Mariposa County, 798 F.2d 364 (9th Cir. 1986), cert. denied sub nom. LaBarge v. County of Mariposa, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987) ignored federal law and this Court's ruling in Lockheed, by holding the government's immunity must be determined by analogy to state workers' compensation statutes. Bell I, 833 F.2d at 1377-1379; Bell III, 967 F.2d at 308-309; LaBarge 798 F.2d at 369. In both cases the Ninth Circuit reasoned the claimant must depend upon a state substantive right to contribution or indemnity which is barred under the "analogous" state worker's compensation

scheme. Bell I, 833 F.2d at 1377-1379; Bell III, 967 F.2d at 308-309; LaBarge, 798 F.2d at 367-68.

The analogy in the present case and LaBarge to state compensation immunities also conflicts with the decisions of this Court in United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), and Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). In both Muniz and Rayonier, this Court rejected similar arguments permitting the government to analogize itself to, and enjoy the benefits of, state created immunities. Muniz at 164 (rejecting analogy to state jailer immunities in suit by federal prisoner under the FTCA; Court stating "we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity," and then applying a federal standard of care under 18 U.S.C. § 4042);

Rayonier at 317-319 (rejecting analogy to local immunities for negligence in fire suppression under state law).

In sum, the Ninth Circuit in the present case and LaBarge, have departed from the Richards "whole law" concept and reverted back to apply the purely "internal law" of the state. This case and LaBarge are in conflict with Richards and other circuits involving proper analysis of federal preemption and the application of state law to the federal government under the FTCA.[2]

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[2]See also, Bilderback v. United States, 558 F.Supp. 903 (D.Or. 1982), in an FTCA action arising out of collision between an automobile and a Forest Service pack horse, court concluded: "federal law may provide the rule of decision in an FTCA suit when the state court in the state where the act or omission occurred would apply federal law in a like action between private parties." Id. at 908.

## IV.

**UNDER THE RICHARDS "WHOLE LAW" RULE, THE AWCA IS PREEMPTED BY THE FECA AND THIS COURT'S DECISION IN LOCKHEED.**

State law which conflicts with federal law is "without effect." Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). "The purpose of Congress is the ultimate touchstone of pre-emption analysis." Cipollone v. Liggett Group, Inc., ___ U.S.___, 112 S.Ct. 2608, 2617, ___ L.Ed.2d ____ (1992) (quoting from Malone v. White Motor Corp., 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.Ed.2d 443 (1978) and Retail Clerks v. Schermerhorn, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)). In determining whether a state law is preempted by federal law this Court has stated:

> Congress' intent may be "explicitly stated in the statute's language or

> implicitly contained in its structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'"

Cipollone at 2617. (Citations omitted.)

The FECA was enacted to provide a comprehensive compensation system for federal employees who sustain injury in the course of their duties. Johansen v. United States, 343 U.S. 427, 432, 72 S.Ct. 849, 853, 96 L.Ed 1051 (1952). The FECA encompasses a covered employee's exclusive remedy against the government. 5 U.S.C. § 8116(c). The FECA was specifically enacted to provide exclusive and preemptive remedies for all work-related activities of a covered employee. Alexander v. Frank, 777 F.Supp. 516, 523 (N.D.Tex. 1991), citing Avasthi v. United States, 608 F.2d 1059,

1060 (5th Cir. 1979); Black v. Frank, 730 F.Supp. 1087, 1090 (S.D. Ala. 1990).

Thus, by the explicit language of the FECA and the reasonable inference that Congress intended to leave no room for the states to act in the area of federal employee compensation for work-related injury, the FECA preempts state compensation law, including the AWCA, for federal employees who fall within its coverage.

It is undisputed that Mitchell was a covered employee under the FECA and received benefits from the FECA. It is also undisputed that Mitchell has not and can not make any claim against the AWCA for his injuries. It is without question therefore, that the AWCA is preempted by the FECA from having any application in the present case.

In Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), this Court

held that the FECA does not bar claims for indemnity. At issue in Lockheed was whether the FECA's exclusive-remedy provision, 5 U.S.C. § 8116(c), barred Lockheed's claim to indemnity under the FTCA. Examining the scope of the FECA exclusivity provision this Court stated:

> [t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of [tort] law affecting the mutual rights and liabilities of private [parties] in [indemnity] cases." (citation omitted). Section 8116(c) was intended to govern only the rights of employees, their relatives and people claiming through or on behalf of them (footnote omitted). These are the only categories of parties who benefit from the "quid pro quo" compromise that the FECA adopts. (citation omitted).

Id. at 197 (quoting in part Weyerhaeuser S.S. Co v. United States, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed. 2d 1 (1963)). This Court specifically rejected the government's request to abolish third

party indemnity, as Congress had provided no "quid pro quo" exchange as it had in the LHWCA context.[3] Id. at 199. Thus, Lockheed held that until such time as Congress directs otherwise, third party indemnity claims were not barred under the FECA exclusivity provisions.[4] See also, United States v. Yellow Cab. Co., 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951) (under FTCA government waives immunity except for twelve listed classes of claims).

Federal and state courts are bound to follow decisions of this Court on

---

[3]This Court noted that Congress amended the LHWCA such that an injured longshoreman's employer was no longer liable to a shipowner for tort damages paid to the employee, and at the same time abolished the injured employee's seaworthiness remedy against the shipowner. Thus, "Congress had abolished the third-party indemnity action only in conjunction with a 'quid pro quo' to benefit the third parties." Lockheed, 460 U.S. at 198, 103 S.Ct. at 1038-39.

[4]In dissent, Justice Rehnquist acknowledged that majority opinion expanded the liability to which the government may be subject to. 460 U.S. at 203.

issues of federal law. United States v. Gilbert Assoc's. Inc., 345 U.S. 361, 363, 73 S.Ct. 701, 97 L.Ed. 1071 (1953); United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-1074 (7th Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971). Thus, on the issue of whether an indemnity claim can be asserted against the government under the FTCA, the Richards "whole law" analysis dictates that the AWCA is pre-empted by the FECA and the Ninth Circuit is bound to follow this Court's decision in Lockheed on the issue of whether the exclusivity provisions of the FECA bars a third-party claim for indemnity under the FTCA.

## CONCLUSION

There is a conflict between the courts of appeals in applying the

Richards "whole law" analysis to determine when state or federal law should be applied in an FTCA claim.

The Federal Tort Claims Act waives sovereign immunity to permit suits for negligence against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Richards requires examination of the state's "whole law" which may include looking to federal law, to determine whether the United States if a private person would be liable under like circumstances. Although Alaska state law grants petitioners a substantive right to indemnity, federal law controls the issue of whether such a claim is barred under the FECA.

The Ninth Circuit's wooden application of the "like circumstance" requirement and application of pure Alaska "internal law" conflicts with this Court's decisions in Richards and Lockheed. Certiorari is necessary to resolve important questions affecting federal preemption and application of state substantive law to the government in FTCA claims.

DATED this 9 day of September, 1992.

Respectfully submitted,

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No. _____

In The

# Supreme Court of the United States

October Term, 1992

SEA AIRMOTIVE, INC.;
GAY AIRWAYS, INC.;
A.E. GAY, INC.;
A.E. GAY,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## APPENDIX

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## Appendix A

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Opinion of the United States
District Court for the
District of Alaska

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BELL HELICOPTER TEXTRON, INC.,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 91-35324

---

BELL HELICOPTER TEXTRON, INC.,
Plaintiff,

and

Sea Airmotive, Inc.; Gay Airways, Inc.;
A.E. Gay, Inc.; A.E. Gay,
Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 91-35338
D.C. No. CV-A-85-685-JKS

OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Jr.,
District Judge, Presiding

Submitted June 3, 1992
Seattle, Washington

Filed June 15, 1992

Before: Jerome Farris, William A. Norris, and Alex Kozinski, Circuit Judges.

Opinion by Judge Farris

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OPINION

FARRIS, Circuit Judge:

The facts are set forth in our prior opinion in this matter. *See Bell Helicopter v. United States*, 833 F.2d 1375, 1376-77 (9th Cir. 1987). On remand, the district court held that: (1) Bell's, Sea Airmotive's, and Gay Airways' implied contractual indemnity and noncontractual indemnity claims are

barred by the Alaska Workers' Compensation Act and (2) Sea Airmotive's and Gay Airways' express contractual indemnity claims are not similarly barred but have not been properly raised. *Bell Helicopter Textron, Inc. v. United States,* 755 F.Supp. 269 (D. Alaska 1990). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We previously determined that, under the Federal Torts Claims Act, 28 U.S.C. § 1346(b), the applicable law is that of Alaska. *Bell Helicopter,* 833 F.2d at 1377-78. Under the Alaska Workers' Compensation Act, an employer is strictly liable to an employee who is injured in the course of employment. *See Lake v. Constr. Mach., Inc.,* 787 P.2d 1027, 1028-29 (Alaska 1990). In return, Alaska Stat. § 23.30.055

provides that the liability prescribed by the Act "shall be exclusive and in place of all other liability of the employer." *See Lake*, 787 P.2d at 1029.

We recognize that our previous opinion contains language that supports Bell's, Sea Airmotive's, and Gay Airways' arguments, but our opinion preceded the Alaska Supreme Court's decision in *Lake*. Based on section 23.30.055, the court in *Lake* held that "an employer may be joined as a third-party defendant only when another party asserts an express indemnity claim against it." *Id.* at 1031. Although *Lake* involved a defendant's attempt to join an employee's employer as a third-party defendant under Alaska Stat. § 09.17.080, there is no basis to conclude that the Alaska Supreme Court would allow a similar action merely

because the employer is sued separately. *See Providence Washington Ins. v. DeHavilland Aircraft*, 699 P.2d 355, 357 (Alaska 1985) (section 23.30.055 precludes implied indemnity claim against employer). The parties' implied contractual indemnity and noncontractual indemnity claims therefore must fail.

[1] Sea Airmotive and Gay Airways emphasize that *Providence Washington Ins.* held that a common law indemnity claim is not barred by section 23.30.055 if there is "a contractual or other duty between the indemnitor and indemnitee." *Id.* (footnote omitted). We understand Sea Airmotive's and Gay Airways' argument, but, under *Lake*, an express contractual indemnity agreement cannot create a common law indemnity claim because such a claim is barred by section 23.30.055; *only* an express

indemnity claim is not barred by this provision. *See Lake*, 787 P.2d at 1031. Further, "other duty," *Providence Washington Ins.*, 699 P.2d at 357, refers, for example, to the implied duty owed by a manufacturer to a downstream retailer, *see, e.g., Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499 (Alaska 1988), and is not relevant to this case.

Sea Airmotive's and Gay Airways' complaint alleges as follows:

> *FIRST CLAIM FOR RELIEF*
>
> . . . .
>
> The negligence of defendant, if any, was primary and active while that of plaintiffs, if any was secondary and passive. Accordingly, plaintiffs are entitled to recover indemnity from defendant for all amounts paid in

> settlement of the claim brought by Mitchell . . . .
>
> *SECOND CLAIM FOR RELIEF*
>
> . . . .
>
> By virtue of Alaska's Contribution Statute, AS §§ 09.16.010-09.16.060, and the negligence of defendant's employee, defendant is obligated to reimburse plaintiffs their pro rata portion of the amount paid in settlement of this case.

The district court correctly concluded that Sea Airmotive and Gay Airways did not raise an express contractual indemnity claim.

AFFIRMED.

## Appendix B

### Order & Opinion of United States District Court, District of Alaska

BELL HELICOPTER TEXTRON, INC., A DIVISION OF TEXTRON, INC.; Sea Airmotive, Inc.; Gay Airways, Inc.; A.E. Gay, Inc.; and A.E. Gay, Plaintiffs,

v.

UNITED STATES of America, Defendant.

No. A85-685 Civ.

United States District Court, D. Alaska.

Dec. 27, 1990.

ORDER GRANTING THE UNITED STATES SUMMARY JUDGMENT ON ALL INDEMNITY CLAIMS

SINGLETON, District Judge.

On September 28, 1990, this court entered an oral decision on the record granting the United States summary judgment against the plaintiffs. In this written decision, the court will summarize its reasons.

The following facts are not in dispute and are from the Ninth Circuit decision in *Bell Helicopter v. United States*, 833 F.2d 1375, 1376-77 (9th Cir. 1987). On June 13, 1979, a helicopter piloted by Lieutenant William Harrigan, an officer of the National Oceanographic and Atmospheric Administration ("NOAA"), crashed near Port Hardy, British Columbia. The crash occurred during Harrigan's attempt to land after running out of gas. A passenger, Gary Mitchell, a civilian employee of NOAA, and Harrigan were both seriously injured.

Mitchell and Harrigan sued Bell Helicopter Textron, Inc. ("Bell"), the manufacturer of the aircraft, as well as Sea Airmotive, Inc. ("Sea Air"), and Gay Airways, Inc. ("Gay"), the seller and lessor of the aircraft, respectively, in a consolidated action in Alaska Superior

Court. They alleged that Bell, Sea Air and Gay were liable in tort for manufacturing and furnishing the helicopter to the United States ("the government") in an uncrashworthy condition. On February 20, 1985, the case settled for approximately 2.4 million dollars. After the crash, Mitchell also received benefits available to him under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.* (1980). Most of these FECA benefits were later repaid to the government by Mitchell as required by statute.

Following the settlement of Mitchell's claims against them, Bell, Sea Air and Gay (collectively "plaintiffs") sued the government for indemnity or contribution pursuant to the Federal Tort Claims Act ("FTCA"), 28

U.S.C. §§ 1346, 2671 *et seq.* (1976 & Supp. 1990). Plaintiffs argue that the crash occurred because Harrigan was negligent in failing to properly undertake preflight planning procedures in Alaska, by permitting the aircraft to run out of gas, and in refusing plaintiffs' offer of remedy an alleged defect prior to the crash—to provide shoulder harnesses.

District Court Judge James A. Fitzgerald dismissed the action on the grounds that the government, when treated as a private employer, enjoys immunity from claims of contribution and indemnity afforded it under the Alaska Workers' Compensation Act ("AWCA") (Alaska Stat. §§ 23.30.005-23.30.145). Alaska Stat. § 23.30.005 (1984).[1] On

---

[1]Alaska Statute § 23.30.055 (1990) was amended effective July 1, 1988. The amendments apply to injuries sustained on or after July 1, 1988, and

appeal, the Ninth circuit agreed with Judge Fitzgerald that Plaintiffs' claims for indemnity and contribution were barred by the exclusive-remedy provision of AWCA. *Bell*, 833 F.2d at 1378-79. In reaching its conclusions, the court relied heavily on its earlier decision in *LaBarge v. County of Mariposa*, 798 F.2d 364 (9th Cir. 1986), *cert. denied sub nom. County of Mariposa v. United States*, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

Following *LaBarge*, the court affirmed Judge Fitzgerald's conclusion that the federal courts must look to Alaska law to determine questions of contribution and indemnity. The FTCA only extends liability to the government

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therefore would not be applicable to this case. *See* ch. 79, SLA 1988. The amendments added the following sentence: "The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022."

under circumstances where a private person would be liable according to the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). The court concluded that for purposes of indemnity, the government should be treated as a private employer who would be immune from indemnity by virtue of the exclusivity provision of AWCA.

The court specifically rejected the contention that third-party claims for indemnity were expressly permitted by FECA, thereby distinguishing *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). The court interpreted *Lockheed* to hold that FECA itself did not preclude third-party claims for indemnity. However, the courts must still look to the underlying substantive law, which in this case is FTCA. The

court determined that FTCA requires an interpretation of the law of the state in which the tort occurs, to answer the question of whether state law would permit indemnity and contribution claims by a third party against the employer for damages paid to an injured employee.

While the Ninth Circuit largely agreed with Judge Fitzgerald's handling of the case, the court concluded that the district court had failed to address certain issues that must be addressed in order to completely resolve the case. *Bell*, 833 F.2d at 1379. Specifically, questions of express contractual indemnity, implied contractual indemnity, and implied noncontractual indemnity were left open by Judge Fitzgerald's decision. Therefore, the Ninth Circuit remanded the case to address these issues. In so doing, it

directed the attention of this district court to two prior decisions, *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F.Supp. 826 (D. Alaska 1972) and *Industrial Risk Insurers v. Creole Prod. Servs., Inc.*, 568 F.Supp. 1323, 1328 (D. Alaska 1983), *aff'd*, 746 F.2d 526 (9th Cir. 1984), which the court thought might be helpful on remand.

On remand, the government asked Judge Fitzgerald to enter judgment in its favor arguing that the Ninth Circuit had misconstrued Alaska law. Judge Fitzgerald declined to do so, reasoning that the Ninth Circuit had asked him to consider the requirements set out in *Industrial Risk Insurers* which Judge Fitzgerald concluded would govern further proceedings in this case. The government then filed a motion to dismiss which plaintiffs opposed. In

the meantime, the case was reassigned to District Court Judge Andrew H. Kleinfeld. Judge Kleinfeld concluded that the case should be decided on motions for summary judgment rather than on a motion to dismiss, to ensure that all relevant facts would be marshalled and a complete picture of the case disclosed. Thereafter, both parties moved for summary judgment. The case was later reassigned to me, and as a housekeeping measure, I entered an order denying the motion to dismiss without prejudice, to allow consideration of the issues raised in connection with the pending motions for summary judgment.

[1] At the outset, we are faced with the doctrine of the "law of the case." This court should not reexamine an issue previously decided by it or a higher court in the same case in

the absence of good cause. *See Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) *amended*, 860 F.2d 357 (9th Cir. 1988). Good cause exists to reexamine, only where the prior decision overlooked or failed to consider controlling law, where there has been an intervening change in the law, or where the evidence on remand is substantially different on significant issues from the record that existed at the time of the earlier decision. *See, e.g., Planned Parenthood of Cent. & N. Arizona v. Arizona*, 718 F.2d 938, 949 (9th Cir. 1983), *aff'd mem. sub nom. Babbitt v. Planned Parenthood of Cent. & N. Arizona*, 479 U.S. 925, 107 S.Ct. 391, 93 L.Ed.2d 346 (1986). The Ninth Circuit and Judge Fitzgerald have previously decided that plaintiffs' right to indemnity and contribution is

governed solely by the law of the State of Alaska and that in determining whether there is a right to indemnity or contribution, we must consider the government as a private employer who has paid compensation under the Act and is subject to AWCA. *Bell*, 833 F.2d at 1378; *LaBarge*, 798 F.2d at 366-68.[2]

[2] The Ninth Circuit did not determine whether Alaska law would or would not allow indemnity or contribution under the applicable facts. It simply directed this district court to consider those issues and decide them. We are thus faced with three issues. First, would the law of Alaska recognize an action by a third party for indemnity from the employer of an

---

[2]Plaintiffs point out that Alaska Stat. § 23.30.055 only shields employers who are subject to the Act and pay compensation under it. They argue that the government does not satisfy this test. *LaBarge* precludes this argument.

employee injured in part by the actions of the third party based upon an express contract to indemnify, despite the exclusive remedy provision of AWCA? The answer is yes. *See Northwest Airlines*, 343 F.Supp. at 828-29; *Manson-Osberg Co. v. State*, 552 P.2d 654, 658-59 (Alaska 1976).

On appeal, the Ninth Circuit declined to consider the issue of an express right to indemnity because plaintiffs had failed to plead it or present it to the trial ccurt. On remand, the parties seem to believe that the Ninth Circuit has instructed this district court not to consider that issue, but that does not seem to be the thrust of the Ninth Circuit's opinion. Rather, while declining to consider the matter for the first time on appeal, the court did not preclude this district

court from considering questions of express indemnity on remand if they were properly presented, either by a motion to amend relevant pleadings, or by presentation in an appropriate motion such as a motion for summary judgment. It is not necessary to address that issue, however, because the parties have not requested that the court do so.[3]

[3] Second, would Alaska law recognize a third party's right to implied contractual indemnity against the employer of the injured employee despite AWCA? Here, the answer seems to

---

[3]The government has argued that if the plaintiffs were seeking express contractual indemnity from the government in an amount in excess of $10,000, the Court of Claims would have exclusive jurisdiction over the case under the Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491. *See DSI Corp. v. Secretary of Housing & Urban Dev.*, 594 F.2d 177, 180 (9th Cir. 1979). The government also argues that plaintiffs in fact submitted their claims for express indemnity to the Board of Contract Appeals and those claims were rejected on the ground that the contract did not provide for express indemnity. *See Gay Airways, Inc.*, 84-1 B.C.A. (CCH) ¶ 17,199 (1984).

be no. *See Lake v. Construction Mach., Inc.*, 787 P.2d 1027, 1031 (Alaska 1990); *see also Providence Washington Ins. Co. v. DeHavilland Aircraft Co.*, 699 P.2d 355, 357-58 (Alaska 1985); *Manson-Osberg Co.*, 552 P.2d at 658-59; *Golden Valley Elec. Ass'n v. City Elec. Serv., Inc.*, 518 P.2d 65, 69 (Alaska 1974).[4]

Third, would Alaska law recognize a third party's noncontractual right to indemnity against the injured party's employer under the common law despite AWCA? *See* Restatement of Restitution § 76 (1936); Restatement (Second) of Torts § 886(1)(B). This is the most difficult question presented on remand. On the one hand, Alaska law does

---

[4]It would appear that a claim for implied contractual indemnity, as opposed to implied noncontractual indemnity, for an amount greater than $10,000 would also be within the exclusive jurisdiction of the Court of Claims. *See* 28 U.S.C. §§ 1346(a)(2), 1491.

recognize a noncontractual right to indemnity under some circumstances. *See Fairbanks North Star Borough v. Roen Design Assocs., Inc.*, 727 P.2d 758, 760-62 (Alaska 1986), *appeal after remand, Fairbanks North Star Borough v. Kandik Constr., Inc. & Assocs.*, 795 P.2d 793 (Alaska 1990) (*reh'g granted* for Roen Design on April 17, 1990); *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1065-67 (Alaska 1979). Alaska law apparently does not recognize such a right where the third party sues the employer for injury to an employee. *Providence Washington Ins. Co.*, 699 P.2d at 357.

On the other hand, the issue of a noncontractual right to indemnity between a third party held liable to an injured employee and the employer has been specifically reserved by the Alaska

Supreme Court. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 436 n. 36 (Alaska 1979); *Golden Valley Elec. Ass'n*, 518 P.2d at 69 n. 16. However, more recent cases suggest that only a third-party's express contractual right to indemnity from the employer will be recognized. *See, e.g., Lake*, 787 P.2d at 1031.

[4] Having carefully reviewed the authorities, I am satisfied that Alaska law would not recognize an action for implied noncontractual indemnity by the plaintiffs against the government under the undisputed facts of this case. A number of reasons lead me to this conclusion.

First, *Northwest Airlines* and *Industrial Risk Insurers* are not on point. *Northwest* involved express contractual indemnity and *Industrial*

*Risk Insurers* did not involve an attempt to recover indemnity from an employer protected by AWCA's exclusive remedy provision for damages paid to an injured employee.

[5] Second, *Industrial Risk Insurers*, 568 F.Supp. at 1328, establishes a three-part test that must be met in order for a noncontractual right of indemnity to arise under Alaska law. The test requires that the indemnitee must discharge a legal obligation, *i.e.*, a tort liability to a third party. This requirement is met in this case. The other two requirements are that the indemnitor must also be liable to the third party for the same obligation, and as between the indemnitee and the indemnitor, the obligation ought to be discharged by the latter. *Id.*

The government was not liable in tort to Mitchell because of the exclusive remedy provision of AWCA. *See Providence Washington Ins. Co.*, 699 P.2d at 357.[5] In addition, Alaska law would not support a finding that the government, rather than plaintiffs, ought to discharge the plaintiffs' tort obligation to Mitchell. *See State v. Wien Air Alaska, Inc.*, 619 P.2d 719, 720 (Alaska 1980). This latter conclusion finds support in a number of considerations.

[6] Alaska had adopted the Uniform Contribution Among Tortfeasors Act at the time this case arose. *See* former

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[5]It is lack of a common tort obligation that apparently bars a claim for contribution. *Lake*, 787 P.2d at 1031. The reasons for this are considered in a lucid opinion by the Maryland Court of Appeals in *Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 1246 (1989). These reasons would be equally applicable to an action for implied noncontractual indemnity.

Alaska Stat. §§ 09.16.010-09.16.060 (1983).[6] Contribution, therefore, largely displaced the common law in noncontractual actions for implied indemnity in Alaska. *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 625-26 (Alaska 1983). Nevertheless, AWCA precludes the assertion of a contribution claim against the employer even if the employer's negligence was the proximate cause of the employee's injury. *Lake*, 787 P.2d at 1029; *Wien*, 619 P.2d at 720. It would be anomalous to reject the favored remedy—implied noncontractual indemnity. *Cf. State Mechanical, Inc. v. Liquid Air, Inc.*, 665 P.2d 15, 17-18 n. 2 (Alaska 1983)

---

[6]The Uniform Act was repealed by Initiative Proposal No. 87-2, § 2, effective March 5, 1989. See also § 9 ch. 139 SLA 1986 which governs all causes of action accruing after June 11, 1986, and therefore would not apply to this case. *See Ogle v. Craig Taylor Equip. Co.*, 761 P.2d 722 (Alaska 1988).

(declining to expand common law indemnity to overlap and judicially abrogate portions of the Contribution Act).

[7] Even if AWCA were not a bar, plaintiffs could not prevail on a theory of implied noncontractual indemnity under the facts of this case. Generally, implied indemnity requires a preexisting duty to indemnify arising out of the pretort relationship between the alleged indemnitor and indemnitee. *Providence Washington Ins. Co.*, 699 P.2d at 357-58. The relationship is usually contractual. The Alaska Supreme Court has recognized an implied right to indemnification by a principal held vicariously liable for the tort of its agent. *Moses v. McGarvey*, 614 P.2d 1363, 1373-74 (Alaska 1980); *Austin v. Fulton Ins. Co.*, 498 P.2d 702, 704-05

(Alaska 1972) (relying on Restatement (Second) of Agency §§ 399 & 401).

[8] Strict liability for marketing a defective product was apparently the theory of recovery. The plaintiffs were not held liable to Mitchell on the theory that a principle was liable for the negligence of its agent, the government. Alaska recognizes a right of a retailer, downstream in the chain of distribution of a manufactured article, sued on a theory of strict liability, to obtain indemnity from the manufacturer. *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499, 502-04 (Alaska 1988); *Ross Laboratories, Div. of Abbott Laboratories v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986); *D.G. Shelter Prods. Co. v. Moduline Indus., Inc.*, 684 P.2d 839, 841 (Alaska 1984). Alaska would

not, however, recognize a right in the manufacturer found strictly liable, to seek indemnity from those downstream in the distribution chain, whose negligence contributed to the total loss. *Koehring*, 763 P.2d at 504 n. 7 (citing *Allison Steel Mfg. Co. v. Superior Court*, 20 Ariz.App. 185, 511 P.2d 198, 202-03 (1973)).

[9] Under Alaska law, where the manufacturer is strictly liable and the retailer or downstream user of the article is negligent, neither would appear to be entitled to indemnity from the other, though each could arguably seek contribution under the contribution statute. *Id.; cf. Ogle*, 761 P.2d at 725 (apparently recognizing a right to contribution between a manufacturer and a retailer under such circumstances). *See also Rabon v. Automatic Fasteners,*

*Inc.*, 672 F.2d 1231, 1235 (5th Cir. 1982) (applying Florida law and holding that one who is strictly liable for a defective product is not merely vicariously liable, but is to be entitled to implied indemnity from those whose negligent use of the defective product causes injury to others); *Symons v. Mueller Co.*, 526 F.2d 13, 17-19 (10th Cir. 1975) (same—applying Kansas law); *W.D. Rubright Co. v. International Harvester Co.*, 358 F.Supp. 1388, 1398-1400 (W.D.Pa. 1973) (cited with apparent approval in *Ogle*, 761 P.2d at 725 n. 4) (implying that those strictly liable and those who are negligent are both tortfeasors under the act).[7]

---

[7]This is clear under current Alaska law. *See* Alaska Stat. § 09.17.900 (Supp. 1990) which defines "fault" to include both negligence and strict liability. It is less clear under former law. *See Koehring*, 763 P.2d at 502-04 (holding that as between a manufacturer and a lessor both liable to a third party on the basis of strict liability, the lessor was

[10] If the government's servant, Harrigan, misused the product, or he or Mitchell assumed the risk of any defect, that might have insulated the plaintiffs from liability to Mitchell. *See Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883 (Alaska 1979). It would not have created a duty in the government to indemnify the plaintiffs. *See Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219-20 (9th Cir. 1974) (applying Nevada law). Finally, the government did not fly the helicopter. Its servant, Harrigan, did. The government's liability, if any, would be vicarious based on the doctrine of *respondeat superior*. The government

---

entitled to indemnity because it was not at fault in the sense used in *Vertecs*). In context, the court was simply applying the rule that those downstream in the distribution chain were entitled to indemnity from those upstream and not vice-versa. *Id.* at 504 n. 7. The supreme court in *Koehring* seems to agree with the reasoning I have used in this case.

would therefore be as much without fault as the plaintiffs, although this would be based on different doctrines of liability. Thus, there is no reason why Alaska law would hold the vicariously liable employer morally obligated to pay the strictly liable manufacturer's obligation to the injured employee.

IT IS THEREFORE ORDERED:

The government is entitled to summary judgment against all plaintiffs, dismissing all claims for contribution and indemnity.[8]

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[8]*Fairbanks North Star Borough v. Kandik Constr.*, 795 P.2d 793 (earlier decision *Fairbanks North Star Borough v. Roen Design*, 727 P.2d 758) is not inconsistent with the decision in this case. It did not involve a claim by a third party to recover indemnity from an employer whose employee was injured by the third party.

## Appendix C

### Opinion of the United States Court of Appeals for the Ninth Circuit

BELL HELICOPTER, Plaintiff

and

Sea Airmotive, Inc.; Gay Airways, Inc.; A.E. Gay, Inc.; A.E. Gay, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

Nos. 86-3990, 86-4056.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted Aug. 5, 1987.

Decided Dec. 9, 1987.

Before GOODWIN, ANDERSON and BRUNETTI, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The appellants in this action challenge the district court's order dismissing all of their claims for

contribution and indemnity. The district court held that, by analogy, the United States, when treated as an employer, enjoys the same immunity afforded to private employers under the Alaska Workers' Compensation Act, AS 23.30.055 ("AWCA"). Therefore, since a private employer who pays workers' compensation is immune from third-party actions against them for contribution or indemnity, the United States is also immune.

I.

In a flight from Anchorage, Alaska to Seattle, Washington on June 13, 1979, a helicopter piloted by Lt. William Harrigan, an officer of the National Oceanographic and Atmospheric Administration ("NOAA"), crashed near Port Hardy, British Columbia. The crash occurred during Harrigan's attempt to

land after running out of gas. As a result of the crash, passenger Gary Mitchell, a civilian employee of NOAA, and Harrigan were seriously injured.

Mitchell sued Bell Helicopter Textron, Inc., the manufacturer of the helicopter, Sea Airmotive, Inc., the seller of the helicopter, and Gay Airways, Inc., the lessor of the helicopter ("Appellants") in Superior Court for the State of Alaska. Mitchell alleged that these parties were liable in tort for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the case was settled for approximately $2.4 million. After the crash, Mitchell also received benefits available to him under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101, *et seq.* Most of these

FECA benefits were later repaid to the United States by Mitchell as required by statute.

Following this settlement, Bell, Sea Airmotive, and Gay Airways sued the United States ("the government") for indemnity or contribution pursuant to the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1346, *et seq.* Appellants alleged that the crash occurred because Harrigan was negligent in failing to properly undertake preflight planning procedures in Alaska.

The district court dismissed this action on the grounds that the government, when treated as a private employer, enjoys immunity from claims of contribution and indemnity afforded to it under AWCA.

II.

A district court's legal

conclusions regarding the United States' amenability to a third-party suit under the Federal Tort Claims Act are reviewed de novo. *LaBarge v. Mariposa County*, 798 F.2d 364, 365 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

This suit is brought pursuant to the FTCA which acts as a limited waiver of the government's sovereign immunity. Under this Act, district courts have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. This liability extends to circumstances where the government, if a private person, would

be liable according to the law of the place where the act or omission occurred. 18 U.S.C. § 1346(b). The FTCA further provides that the United States shall be liable for those tort claims in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674. This Court has determined that these provisions "direct the courts to analogize the government to a private actor in a similar situation and apply state law to determine amenability to suit and substantive liability." *LaBarge* at 366.

[1] The act or omission at issue, pilot's negligent preflight planning, occurred in Alaska. We must, therefore, look to the law of Alaska. It is at this point that the parties to this action disagree. Appellants contend

that we should apply Alaska's whole law, including its choice-of-law rules, while the government asserts that there is no need to consider any choice-of-law rules. Appellants argue that to follow the FTCA which provides that liability is determined "in accordance with the law of the place where the act or omission occurred," federal courts are required to apply the whole law of the state where the act or omission occurred, including the state's conflict of laws rules. *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Accordingly, appellants suggest that the issue of immunity should be determined on the basis of the workers' compensation law under which the injured party was employed (i.e., FECA). Under FECA, indemnity actions against the United

States brought by unrelated third parties are not directly barred. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). Thus, appellants should be allowed to proceed with this action.

[2] There are several flaws with this argument. First, this is not a conflicts issue. The cases appellants use to support their argument pertain to multistate tort activity where a distinction was made between the law of the forum and the place of injury. In this case, we are not debating this issue. It has been agreed that the law of the forum will be applied. The question to be answered is how Alaska law would be applied to an Alaska employer in similar circumstances. There is no need to apply the doctrine

of depecage.

Second, *Lockheed* permits third party suits against the United States for indemnity, despite the exclusive remedy provision of FECA if the third party is unrelated. However, to determine if a suit could be maintained, it is necessary to look to the underlying substantive law. The underlying substantive law in this case is the FTCA. It directs us to apply Alaska law which will not allow this suit to be maintained.

Third, a similar argument made to this court was rejected in *LaBarge*. In *LaBarge*, the county was seeking contribution from the United States after settling a tort claim with the estates of three federal Secret Service agents who were killed after colliding with a county sheriff's patrol car. 798

F.2d at 365. The county argued that the suit was brought pursuant to the FTCA, which looked to the application of California (forum) law, which in turn looked to the relevant out-of-state employer's workers' compensation law (FECA). *Id.* at 368.

This Court found that although FECA permits a third-party suit, it does not confer the underlying substantive right to sue. The right to sue must exist independently of FECA's passage allowance of the exercise of that right. Thus, this Court found that while FECA does not bar a third-party claim, there is a vacuum as to substantive law which would give rise to the claim. *LaBarge*, 798 F.2d at 368.

Appellants attempt to distinguish *LaBarge* because the tort there occurred within the forum state and involved a

forum resident. In the instant action, the injury occurred outside Alaska, Mitchell was hired and employed outside the state, and he was subject to another workers' compensation system. However, under the FTCA, we are required to treat the government as a private employer in similar circumstances so the only distinction would be that the accident occurred outside the forum state.

In *LaBarge*, the court responded to the county's argument that the United States should be treated as a private employer, doing business outside California who happened to bring in a few temporary employees for a temporary job instate, by recognizing that the United States is more like a national corporation doing business in all the states. Thus, this Court recognized that the United States had a presence in

California despite the fact that some of the injured employees were stationed out of state.

The *LaBarge* court went on to recognize the equities presented in that case and the arguable unfairness of requiring the county to pay for the United States' negligence. But this did not prevent the Court from finding that since California law barred a contribution suit when the employer was subject to workers' compensation law, the suit against the United States was also barred.

In determining that the United States' payment of FECA benefits was comparable to the payment of state workers' compensation benefits, this Court noted that the statutory language of the FTCA of "like circumstances" does not refer to the same circumstances but

rather to those under similar circumstances. Since the federal government could never be exactly like a private actor, this Court found that to apply this standard, it is a court's job to find the most reasonable analogy. Because FECA is comparable to a state workers' compensation law, all other things being equal, the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workers' compensation laws. *LaBarge*, 798 F.2d at 366-67.

This suit was filed pursuant to the FTCA. Consequently, the United States, which has the standing of a litigant doing business in all fifty states and is subject to the immunities provided by the state law in whichever state the action is brought, is immune because an Alaska employer under the same

circumstances would be immune.

III.

Although we find that appellants' claims are barred under the exclusivity provision of AWCA, we must also consider appellants' claim of express or implied indemnity under Alaska law. A party cannot raise an issue for the first time on appeal. Thus appellants' argument of express contractual indemnification must fail. In the proceeding below, appellants did not argue express contractual indemnification. Rather, in their complaint they sought indemnity on the grounds that the government's negligence was primary and active, while theirs was secondary and passive. In addition, in their Memorandum in Opposition to Defendant's Motion to Dismiss, appellants argued that they were entitled to recover indemnity

because they met common law indemnity requirements. Since the "unspoken element" in implied indemnity cases is the existence of contractual or other duty, appellants used the language in the contract (where the government agreed to assume all risk of loss) as evidence of implied, not express, contractual indemnification. Because appellants did not raise the issue of express contractual indemnification, we are foreclosed from considering it on this appeal.

The district court order which granted the government's motion to dismiss stated that the order was granted because the government, in FTCA actions, should be treated as a private employer covered by states' workers' compensation schemes. Since a private employer enjoys the immunity from claims

of contribution and indemnity afforded to it under the exclusive remedy provision of A.S. 23.30.055, so does the government. The district court also found that Alaska's choice-of-law rules were not an issue in the case. The district court, however, did not address the implied right of indemnity issue.

[3] The exclusivity provisions of AWCA do not preclude express or implied contractual indemnity. *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F.Supp. 826 (D. Alaska 1972). If the government agreed to assume the risk of loss, there may be a right of indemnity separate from the right of contribution. The issue of whether implied indemnity exists must be answered. Appellants argue that they have a noncontractual right of implied indemnity from the government. The

question is whether the requirements for common law indemnity provided in *Industrial Risk Insurers v. Creole Product Services*, 568 F.Supp. 1323 (D. Alaska 1983), *aff'd*, 746 F.2d 526 (9th Cir. 1984), have been satisfied. These requirements are (1) indemnity claimant has discharged a legal obligation owed to a third party, (2) the defendant is also liable to the third party, and (3) between the indemnity claimant and the defendant, the defendant ought to discharge the obligation.

[4] Alaska law also provides that concurrent tortfeasors are not entitled to indemnification. *Vertecs Corp. v. Reichhold Chemicals, Inc.*, 661 P.2d 619, 626 (Alaska 1983). Thus if implied indemnity requirements are met, this issue must also be determined. These issues should have been addressed by the

district court.

We agree with the district court's ruling that the United States, when treated as an employer, enjoys immunity from claims of contribution and indemnity afforded to it by the exclusivity provision of AWCA. However, we find that appellants' claim of implied indemnity must be determined by the district court. We vacate the order of dismissal and remand for further proceedings consistent with this opinion.

No costs are allowed to any party. The request for attorney's fees is DENIED.

## Appendix D

Memorandum and Order
United States District Court
District of Alaska

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

BELL HELICOPTER TEXTRON, INC., a division of Textron, Inc., SEA AIRMOTIVE, INC.; GAY AIRWAYS, INC.; A.E. GAY, INC.; and A.E. GAY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. A85-685 Civil

MEMORANDUM AND ORDER

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On June 13, 1979, a Bell Model 206B helicopter crashed in British Columbia, Canada. The pilot William J. Harrigan and his passenger Gary Mitchell, both

employees of the national Oceanographic and Atmospheric Administration survived the accident but sustained serious injuries. Neither pilot Harrigan or passenger Mitchell were based nor resided in Alaska. Passenger Mitchell sued Bell Helicopter Textron, Inc., (Bell) the manufacturer of the helicopter, Sea Airmotive, Inc., the seller of the helicopter and Gay Airways, Inc., the lessor of the helicopter in Superior Court for the State of Alaska. Mitchell alleged that they were liable in tort for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. The case was ultimately settled on February 20, 1985, for the approximate amount of $2,400,000. Mitchell also received benefits available to him under the

Federal Employees Compensation Act, 5 U.S.C. §§ 8101 et seq.

Bell, Sea Airmotive and Gay Airways instituted suit in this court on December 18, 1985, seeking indemnity and contribution from the government under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 1346(b), 2671 et seq. The government has moved to dismiss the complaint on the basis that Alaska law bars indemnity and contribution claims against employers. For the reasons stated below I agree.

Plaintiffs' Bell, Sea Airmotive and Gay Airways suggest that this court should look to Alaska's choice-of-law rules and apply federal substantive law contained in the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101 et seq. However, plaintiffs assert that this court has jurisdiction

over their claims under the FTCA.

Under the FTCA, the government is liable only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred", 28 U.S.C. § 1346(b). In the same case at bar, plaintiffs have alleged that pilot Harrigan was negligent in failing to properly undertake pre-flight planning procedures in Anchorage, Alaska. Thus, I find it necessary to look to Alaska law in determining whether the government is liable for indemnity or contribution.

In Alaska, a private employer would be covered by the Alaska Workers Compensation Act, 23.30.005-23.30.270. The Alaska Supreme Court has held that the exclusive remedy provision of the

Act, 23.30.055[9] bars third-party claims for indemnity and contribution against an employer. State v. Wien Air Alaska, 619 P.2d 719 (Alaska 1980).

Plaintiffs suggest that Alaska courts would, under a choice-of-law rules analysis, apply federal substantive law in determining whether the government is immune from suit. In Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983) the Supreme Court held that the exclusive liability provision of the Federal Employees Compensation Act, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States. However, Lockheed does not automatically entitle third parties to

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[9]A.S. 23.30.055 provides in relevant part:

The liability of an employer prescribed in A.S. 23.30.045 is exclusive and in place of all other liability of the employer. . .

bring indemnity or contribution claims against the government. The Court noted that the existence of such a remedy is governed by the underlying substantive law. Lockheed, 460 U.S. 197-98. Lockheed only stands for the proposition that the FECA does not present a bar to third-party claims against the United States as the validity of Lockheed's underlying substantive claim was not before the court. Id. at 199.

In this case the applicable substantive law is the FTCA. The FTCA proscribes that the government's liability shall be determined "in accordance with the law of the place where the act of omission occurred" 28 U.S.C. § 1346(b). To apply the provisions of FECA and the holding of Lockheed to plaintiffs' claims would be inconsistent with the plain terms of the

FTCA.

The issue of whether the government in FTCA actions should be treated as a private employer covered by state workers' compensation schemes even though it does not participate in the state's program has been addressed and answered in the affirmative by several federal courts. See e.g., In re All Maine Asbestos Litigation (PNS Cases) 772 F.2d 1023, 1028 (1st Cir. 1985); General Elec. Co. v. United States, 603 F.Supp. 881, 884 (D. Md. 1985) and Giannuzzi v. Doninger Metal Products, 585 F.Supp. 1306, 1310 (W.D. Pa. 1984). In Giannuzzi, the court stated:

> Congress enacted the Federal Employees Compensation Act to assist the federal government achieve its goal of becoming a "model employer" . . . In a realistic sense, the Act is the government's "answer to Workman's Compensation, . . . first enacted in Pennsylvania three years prior to the

> passage of the FECA" . . . That the federal program rather than the state program paid benefits to plaintiff is not significant. Because Pennsylvania law requires private employers to pay premiums to the workman's compensation fund and because federal law requires the United States to be a private employer in tort cases, it can be assumed for litigation purposes that the requirement of a "quid pro quo" has been satisfied. We hold the fact that the federal government did not make payments to the Pennsylvania workman's compensation fund does not affect the bar of state law in a tort suit against the United States or an employer.

585 F.Supp. at 1310.

I find the reasoning of Giannuzzi to be more persuasive than that of the unreported decision of LaBarge et al. v. County of Mariposa, No. CV-F-83-174 REC (E.D. Cal. 1984). Plaintiffs rely on LaBarge in support of their contention that federal substantive law in FECA should be applicable to this case.

However, LaBarge ignores the proper analysis to be followed under the FTCA.

Finally, I find Alaska's choice-of-law rules not to be in issue in this case. In Richards v. United States, 369 U.S. 1 (1963) the Supreme Court held that in multistate tort actions the FTCA "requires application of the whole law of the state where the act or omission occurred", including its choice of law rules. However, the facts of Richards are distinguishable from the case at bar. By the very terms of plaintiffs' complaint and by agreement of the parties this court is not faced with a multistate tort action which necessitates application of Alaska's choice-of-law rules.

I conclude that the government when treated as a private employer enjoys the immunity from claims of contribution and

indemnity afforded to it by A.S. 23.30.055.

The clerk is directed to enter a final order dismissing plaintiffs' claims and the government's motion to dismiss is GRANTED.

DATED this 18 day of June, 1986, at Anchorage, Alaska.

JAMES M. FITZGERALD
United States District Judge

cc: Robert Baker (ROBERTSON, MONAGLE)
Lloyd Ericsson
U.S. Attorney

## APPENDIX E

## Statutes Involved

**5 U.S.C. § 8116. Limitations on right to receive compensation**

(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--

(1) in return for service actually performed;

(2) pension for service in the Army, Navy, or Air Force

(3) other benefits administered by the Department

of Veterans Affairs unless such benefits are payable for the same injury or the same death; and

(4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.

(b) An individual entitled to benefits under this subchapter because of his injury, or because of the death of an employee, who also is entitled to receive from the United States under a provision of statute other than this subchapter payments or benefits for that injury or death (except proceeds of an insurance policy), because of service by him (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he will receive. The individual shall make the election within 1 year after the injury or death or within a further time allowed for good cause by the Secretary of Labor. The election when made is irrevocable, except as otherwise provided by statute.

(c) The liability of the United States or an instrumentality thereof

under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 542; Pub.L. 90-83, § 1(56), Sept. 11, 1967, 81 Stat. 210; Pub.L. 93-416, §

9(a), Sept. 7, 1974, 88 Stat. 1145.

(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under subchapter III of chapter 84 of this title or benefits under title II of the Social Security Act shall be entitled to all such benefits, except that--

(1) benefits received under section 223 of the Social Security Act (on account of disability) shall be subject to reduction on account of benefits paid under this subchapter pursuant to the provisions of section 224 of the Social Security Act; and

(2) in the case of benefits

received on account of age or death under title II of the Social Security Act, compensation payable under this subchapter based on the Federal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to Federal service of that employee covered by chapter 84 of this title. However, eligibility for or receipt of benefits under chapter 84 of this title, or benefits under title II of the Social Security Act by virtue of service covered by chapter 84 of this title, does not affect the right of the employee to compensation

for scheduled disabilities specified by section 8107(c) of this title.

**28 U.S.C. § 1346. United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon

the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the

National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have

exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C. §§ 2671 to 2680

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any

federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(As amended July 18, 1966, Pub.L. 89-506, § 8, 80 Stat.a 307; Dec. 29, 1981, Pub.L. 97-124, § 1, 95 Stat. 1666; Nov. 18, 1988, Pub.L. 100-694, § 3, 102 Stat.

4564).

**§ 2672. Administrative adjustment of claims of $2,500 or less**

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Subject to the provisions of this

title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of appropriations available to such agency.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by

reason of the same matter. June 25, 1948, c. 646, 62 Stat. 983; Apr. 25, 1949, c. 92, § 2(b), 63 Stat. 62; May 24, 1949, c. 139, § 125, 63 Stat. 106; Sept. 23, 1950, c. 1010, § 9, 64 Stat. 987; Sept. 8, 1959, Pub.L. 86-238, § 1(1), 73 Stat. 471.

**§ 2673. Reports to Congress**

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim. June 25, 1948, c. 646, 62 Stat. 983.

**§ 2674. Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a

private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been

available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

**§ 2675. Disposition by federal agency as prerequisite; evidence**

(a) An action shall not be

instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the

Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(As amended July 18, 1966, Pub.L. 89-506, § 2, 80 Stat. 306.)

**§ 2676. Judgment as bar**

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. June 25, 1948, c. 646, 62 Stat. 984.

**§ 2677. Compromise**

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

**§ 2678. Attorney fees; penalty**

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any

settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(As amended July 18, 1966, Pub.L. 89-506, § 4, 80 Stat. 307.)

**§ 2679. Exclusiveness of remedy**

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under

section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money against the estate of such employee. Any other civil action or proceeding for money damages

arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The

employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim

arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.

Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certificate of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United

States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place ink which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948, c. 646,, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539.

**§ 2680. Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or

based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 or Title 46, relating

to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That with regard to acts or

omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation

of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a) 2,

13(5), 64 Stat. 1038, 1043; Aug. 18, 1959,, Pub.L. 86-168, Title II, § 202(b), 73 Stat. 389.

**Alaska Stat. Sec. 23.30.055.**

**Exclusiveness of liability.** The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if no employer fails to secure payment of compensation as required by this

chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. (§ 4 ch 193 SLA 1959; am § 1 ch 42 SLA 1962; am § 11 ch 79 SLA 1988)

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No. 92-457

# In the Supreme Court of the United States

OCTOBER TERM, 1992

SEA AIRMOTIVE, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States, when it has paid benefits to an injured federal employee under the Federal Employees' Compensation Act, is entitled to the same immunity from suit by a third party for indemnity or contribution as would inure to a private employer who had paid compensation to an injured employee pursuant to the applicable state workers' compensation law.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The second opinion of the court of appeals (Pet. App. A1-A7) is reported at 967 F.2d 307. That court's first opinion (Pet. App. A33-A50) is reported at 833 F.2d 1375. The second opinion of the district court (Pet. App. A8-A32) is reported at 755 F. Supp. 269. That court's first opinion (Pet. App. A51-A60) is unreported.

### JURISDICTION

The opinion of the court of appeals was rendered on June 15, 1992. A petition for a writ of certiorari was filed

on September 14, 1992.[1] This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On June 13, 1979, a helicopter leased by the National Oceanographic and Atmospheric Administration (NOAA) and piloted by one of its employees ran out of fuel and crashed while en route from Anchorage, Alaska, to Seattle, Washington. Passenger Gary Mitchell, a civilian employee of NOAA, was injured. Pet. App. A34-A35.

Mitchell received compensation pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* He also brought a tort action in the Alaska Superior Court against Bell Helicopter Textron, Inc. (manufacturer of the helicopter) and petitioners Sea Airmotive, Inc. (seller of the helicopter) and Gay Airways, Inc. (lessor of the helicopter). Mitchell claimed that these parties were liable to him for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the parties settled the case for approximately $2.4 million. Pet. App. A35.

2. Petitioners subsequently sued the United States for indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, which under certain circumstances waives sovereign immunity and renders the United States liable "to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. They alleged that the crash occurred because the pilot of the helicopter was negligent in his preflight planning. Pet. App. A36.

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[1] Bell Helicopter Textron, Inc., also a plaintiff and appellant below, has filed a separate petition for certiorari, No. 92-456.

The district court granted the government's motion to dismiss. Pet. App. A51-A60. Under Alaska's workers' compensation law,[2] once an employer pays compensation to an employee for a work-related accident, the employer is not subject to suit for indemnity or contribution by a third party against whom the employee has recovered in a suit concerning the same accident. *Id.* at A53. The district court agreed that because the FTCA renders the United States liable only to the same extent as a private party under like circumstances, the government was entitled by analogy to the immunity from indemnity or contribution that state law would have granted a similarly situated private employer. *Id.* at A36.

3. The court of appeals affirmed the district court's ruling on the contribution issue. Pet. App. A36-A46. Relying on its prior decision in *LaBarge* v. *Mariposa County*, 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), the court framed the issue as "how Alaska law would be applied to an Alaska employer in similar circumstances." Pet. App. A40. Recognizing that "the federal government could never be exactly like a private actor," however, the court sought "the most reasonable analogy." *Id.* at A44-A45. Because the court found FECA "comparable to a state workers' compensation law," it concluded that the United States was entitled to "the same immunity from suit enjoyed by a private employer covered by" the Alaska law. *Id.* at A45.

Although the court of appeals affirmed the dismissal of petitioners' claim for contribution, it found that the district court had not adequately addressed their claim of

[2] Although the accident occurred in Canada, the allegedly negligent planning occurred in Alaska, and the parties agreed below that Alaska law applied. Pet. App. A38, A40.

implied indemnity. It therefore remanded for further consideration of that issue under Alaska law. Pet. App. A46-A50. On remand the district court ruled, based in part on an intervening decision of the Alaska Supreme Court, that petitioners could not recover on any theory of indemnity. *Id.* at A20-A32. The court of appeals affirmed. *Id.* at A1-A7.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The courts of appeals that have addressed analogous issues in recent years have adopted similar interpretations of the FTCA. Accordingly, the petition does not present any issue that warrants review by this Court.

1. Petitioners argue (Pet. 10-13) that the decision below conflicts with *Richards* v. *United States*, 369 U.S. 1 (1962). In *Richards*, this Court interpreted 28 U.S.C. 1346(b), which confers jurisdiction over FTCA suits "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The Court held that Section 1346(b) required application of the "whole law" of the relevant state, including its rules on choice of law. 369 U.S. at 3, 11.

Petitioners appear to contend (Pet. 16-17, 24 n.2) that an Alaska court faced with the present case would have determined the United States' substantive liability under FECA. As the Second Circuit held in *Caban* v. *United States*, 728 F.2d 68 (1984), however, "[a]pplying the state's 'whole law' requires that [a federal court] look to whatever law, including federal law, the state courts would apply in like circumstances *involving a private defendant*." *Id.* at 72 (emphasis added). FECA

does not apply to any employer other than the federal government. Thus, Alaska's choice of law rules could not possibly lead to the choice of FECA as the law applicable to the hypothetical suit between private parties envisioned by the FTCA.

Petitioners cite (Pet. 17-19) two cases in which courts of appeals have found that federal law supplied the rule of decision.[3] In each case, however, the federal law in question was relevant to the issue of what a state court would have found to be the duties and liabilities of a private party in like circumstances. In *Caban* v. *United States*, *supra*, the question was whether officials of the Immigration and Naturalization Service had wrongfully detained the plaintiff at a border stop in New York. 728 F.2d at 70. The New York law of false imprisonment imposed no liability if the defendant could show that his actions were justified by the law of New York or of some other jurisdiction. *Id.* at 72. Thus, the federal law that justified the plaintiff's detention was relevant to the question of whether the INS officials, if private parties, would have been liable to the plaintiff under state law.

Similarly, the court in *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir.), cert. denied, 396 U.S. 960 (1969), determined whether the case should be governed by federal maritime law by considering whether maritime law

[3] Petitioners also cite (Pet. 20-21) *Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978). *Johnson* involved the distinct question of whether *Richards*' "whole law" analysis required the application of state principles of res judicata or collateral estoppel to determine the preclusive effect, in FTCA litigation, of a prior federal judgment. The decision thus concerned a particular "issu[e] of internal court procedure or the relationships between courts," *id.* at 611, and is not relevant to the question of substantive liability presented here.

would have applied had the case been one between private parties. The court relied on *Hess* v. *United States*, 361 U.S. 314, 318 n.7 (1960), in which this Court applied maritime law to an FTCA case on the ground that "[t]here can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law."[4]

FECA, by contrast, is not applicable to cases against a private defendant. Neither *Caban* nor *Gowdy* gives any indication that the Second or Sixth Circuit would have differed from the Ninth Circuit on the proper resolution of the present case. Indeed, other courts of appeals that have addressed the issue of indemnity claims against the United States in circumstances similar to those of this case have shared the Ninth Circuit's conclusion. See *General Electric Co.* v. *United States*, 813 F.2d 1273, 1275-1276 (4th Cir. 1987), vacated on other grounds, 484 U.S. 1022 (1988); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1027-1028 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986).[5]

[4] See also *Bilderback* v. *United States*, 558 F. Supp. 903, 908 (D. Or. 1982), cited at Pet. 24 n.2 ("[F]ederal law may provide the rule of decision in an FTCA suit when the state court in the state where the act or omission occurred would apply federal law in a like action between private parties.").

[5] Courts of appeals have held in various other situations that the United States is entitled, under the FTCA, to protections that would be available to analogous private parties under state law, even where the state law does not literally apply to the federal government. See *Stewart* v. *United States*, 716 F.2d 755 (10th Cir. 1982) (United States entitled to immunity under state workers' compensation statute as a "statutory employer," although not technically covered), cert. denied, 469 U.S. 1018 (1984); *Roelofs* v.

2. Petitioners also contend (Pet. 25-30) that the decision below conflicts with this Court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983). *Lockheed*, however, held only that FECA does not itself bar third-party claims for indemnity. Nothing in the statute or in *Lockheed* suggests that FECA affirmatively authorizes such claims. See Pet. App. A41; *General Electric*, 813 F.2d at 1276 n.2; *Maine Asbestos Litigation*, 772 F.2d at 1028. Indeed, FECA is irrelevant to the question of whether other law provides a ground for recovery. In *Lockheed* itself, after deciding that FECA did not bar the plaintiff's claim, this Court made clear that it was not deciding the separate question of whether the plaintiffs had a valid claim for indemnity from the United States under the governing substantive law. 460 U.S. at 197 n.8, 199.

In this case, as in *Lockheed*, the only law that waives the United States' sovereign immunity is the FTCA. Liability under the FTCA turns, as discussed above, on the

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*United States*, 501 F.2d 87 (5th Cir. 1974) (same); *Starns* v. *United States*, 923 F.2d 34 (4th Cir.) (state cap on damages in a medical malpractice suit, applicable by its terms only to state-licensed facilities), cert. denied, 112 S. Ct. 54 (1991); *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987) (same), cert. denied, 485 U.S. 992 (1988); *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986) (same); *Proud* v. *United States*, 723 F.2d 705 (9th Cir.) (state statute limiting liability of private landowners who open land for public recreational use applies to users of national parks, regardless of whether statute was intended to apply to government-owned land), cert. denied, 467 U.S. 1252 (1984); *Mandel* v. *United States*, 719 F.2d 963 (8th Cir. 1983) (same); *Reilly* v. *United States*, 863 F.2d 149 (1st Cir. 1988) (state "collateral source" statute applicable to state-licensed health care providers also limits United States' liability under FTCA); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n*, 759 F.2d 859 (11th Cir. 1985) (same).

potential liability under the governing substantive law, here the law of Alaska, of a hypothetical private party situated similarly to the United States. Such a party's amenability to suit would be determined, not under FECA, but under the terms of Alaska's workers' compensation statute. Petitioners have failed to make out a case that could be successfully prosecuted against a similarly situated private employer under Alaska law, and the court of appeals therefore correctly affirmed the judgment against them.

3. Petitioners' reliance (Pet. 23-24) on *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957), and *United States* v. *Muniz*, 374 U.S. 150 (1963), is similarly misplaced. Those cases held only that the United States, under the FTCA, may not enjoy certain immunities that state law would grant to a public party, such as a municipality or a state official. This case turns instead on the availability of an immunity that the state grants to similarly situated private parties. See, *e.g.*, *Rayonier*, 352 U.S. at 319 ("the test * * * for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred"). Because Alaska would not impose liability on a private party under the circumstances of this case, the United States cannot be held liable under the FTCA.

The Court in *Muniz* did suggest that there was a proper analogy, for FTCA purposes, between suits by federal prisoners against the United States and suits by state prisoners against state officials or the States themselves, 374 U.S. at 159-160, and nonetheless rejected the application to FTCA actions of immunity principles that might have barred similar suits in some States. *Id.* at 164-165. *Muniz* could thus be read broadly (although

in some tension with *Rayonier*) for the proposition that special federal rules may be appropriate where the only available state law analogy would be to an action against the State or one of its officials. Even so read, however, we think the decision would be best viewed as turning on its unique facts, and of limited relevance to an ordinary FTCA case, such as this, where the analogy to a state law suit against a private party is unproblematic.

4. Finally, petitioners cite *Megge* v. *United States*, 344 F.2d 31 (6th Cir.), cert. denied, 382 U.S. 831 (1965), in which the Sixth Circuit held that the United States was not subject to suit under the FTCA for serving alcohol to an intoxicated serviceman on a military base in Michigan, even though a private, state-licensed tavern would have been subject to suit under Michigan's "dramshop" law. Although *Megge* held that the United States was immune from suit, its reasoning is largely inconsistent with the reasoning relied on in the decision below and in *General Electric*, *Maine Asbestos Litigation*, and the cases cited in note 5, *supra*. More than 25 years have passed since *Megge* was decided, however, and the opinion has never been cited, by the Sixth Circuit itself or by any other federal court of appeals.[6] Moreover, we think it unlikely that the Sixth Circuit would now rely on the reasoning of *Megge*, which was used to restrict the government's waiver of sovereign immunity, to *expand* the liability of the United States beyond that of a private actor under state law. There is accordingly no conflict that warrants review by this Court.

[6] The only district court to cite its result on this question distinguished the case on its facts. See *Deeds* v. *United States*, 306 F. Supp. 348, 355 n.14 (D. Mont. 1969).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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